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In the Supreme Court of the United States

OCTOBER TERM, 1997

PETE WILSON, GOVERNOR OF CALIFORNIA, ET AL., PETITIONERS

v.

JOHN ARMSTRONG, ET AL.

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

DERRICK CLARK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. 12202, which provides that a State shall not be immune under the Eleventh Amendment from suits for violations of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, is a constitutional exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

2. Whether 42 U.S.C. 2000d-7(a)(1), which provides that a State shall not be immune under the Eleventh Amendment from suits for violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, is a constitutional exercise of Congress's authority under Section 5 of the Fourteenth Amendment or the Spending Clause.

3. Whether state prisoners may state a claim against a state prison official or agency for a violation of Section 504 of the Rehabilitation Act or the ADA.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Alexander v. *Choate*, 469 U.S. 287 (1985)	15
Amos v. *Marland Dep't of Public Safety & Correctional Servs.*, 126 F.3d 589 (4th Cir. 1997)	20, 21
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985)	5, 17, 18
Bell v. *New Jersey*, 461 U.S. 773 (1983)	18
Carson v. *American Brands, Inc.*, 450 U.S. 79 (1981)	21
City of Boerne v. *Flores*, 117 S. Ct. 2157 (1997)	4, 9, 10, 11, 12, 16
City of Cleburne v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)	4, 10, 11
Contractors Ass'n of Eastern Pennsylvania, Inc. v. *City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993)	15
Counsel v. *Dow*, 849 F.2d 731 (2d Cir.), cert. denied, 488 U.S. 955 (1988)	17
Crawford v. *Indiana Dep't of Corrections*, 115 F.3d 481 (7th Cir. 1997)	17, 20
EEOC v. *Wyoming*, 460 U.S. 226 (1983)	9
Employment Div. v. *Smith*, 494 U.S. 872 (1990)	11, 12
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976)	9
Gardner v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978)	21
Hutto v. *Finney*, 437 U.S. 678 (1978)	19
Katzenbach v. *Morgan*, 384 U.S. 641 (1966)	4, 16

Cases—Continued: Page

Lake v. *Arnold*, 112 F.3d 682 (3d Cir. 1997) 15
Lane v. *Peña*, 116 S. Ct. 2092 (1996) 17, 18
More v. *Farrier*, 984 F.2d 269 (8th Cir.), cert. denied, 510 U.S. 819 (1993) 15
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 3
Seminole Tribe of Florida v. *Florida*, 116 S. Ct. 1114 (1996) 9
South Dakota v. *Dole*, 483 U.S. 203 (1987) 18
Welch v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987) 17
White v. *Colorado*, 82 F.3d 364 (10th Cir. 1996) 19
Williams v. *Meese*, 926 F.2d 994 (10th Cir. 1991) 20
Yeskey v. *Pennsylvania Dep't of Corrections*, 118 F.3d 168 (3d Cir. 1997), petition for cert. pending, No. 97-634 ..... 19-20, 21
Young, Ex parte, 209 U.S. 123 (1908) 5, 7, 8, 18, 19

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 8, Cl. 1 (Spending Clause) 8, 17
Amend. I (Free Exercise Clause) 11
Amend. VIII 19
Amend. XI ..... *passim*
Amend. XIV 3, 4, 8, 9, 17
§ 1:
Equal Protection Clause 4, 9, 12, 17
§ 5 ..... 3, 9, 12, 16, 17
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*:
42 U.S.C. 12101(a) 4, 14
42 U.S.C. 12101(a)(7) 14
42 U.S.C. 12101(b)(1) 10
42 U.S.C. 12101(b)(4) 9
42 U.S.C. 12131(2) 15
42 U.S.C. 12201(a) 15
42 U.S.C. 12202 ..... 3, 9

Statutes and regulations—Continued: Page

Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* 17
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*:
§ 2(a)(5), 29 U.S.C. 701(a)(5) 4
§ 504, 29 U.S.C. 794 ..... *passim*
§ 504(b), 29 U.S.C. 794(b) 5
Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* 11
42 U.S.C. 2000bb-1 12
28 U.S.C. 1291 21
28 U.S.C. 1292(a)(1) 7, 8, 21
28 U.S.C. 1292(b) 3, 7
28 U.S.C. 2403(a) 3
42 U.S.C. 1985(3) 15
42 U.S.C. 2000d-7 ..... 17, 18
42 U.S.C. 2000d-7(a)(1) 3, 5, 17
28 C.F.R.:
Section 35.130(b)(7) 15, 16
Section 35.150(a)(3) 16
Section 35.164 16

Miscellaneous:

Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393 (1991) 13
H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990):
Pt. 2 ..... 13, 15
Pt. 3 13
Pt. 4 13
National Council on the Handicapped:
On the Threshold of Independence (1988) 13
Toward Independence (1986) 13
S. Rep. No. 116, 101st Cong., 1st Sess. (1989) 13, 15
U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983) 13

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OPINIONS BELOW

The opinion of the court of appeals in *Armstrong* v. *Wilson* (Pet. App. 1a-19a) is reported at 124 F.3d 1019. The opinion of the district court (Pet. App. 20a-45a) is reported at 942 F. Supp. 1252.

The opinion of the court of appeals in *Clark* v. *California* (Pet. App. 46a-55a) is reported at 123 F.3d 1267. The opinion of the district court (Pet. App. 56a-83a) is not reported.

JURISDICTION

The judgments of the court of appeals were entered on August 27, 1997. The petition for a writ of certiorari was filed on October 20, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. *Clark* v. *California*. Respondents Derrick Clark and Ambrose Woods are inmates with developmental disabilities incarcerated in correctional facilities operated by California. Pet. App. 57a-58a. On behalf of themselves and a class, they filed suit in federal district court against petitioners California, the California Department of Corrections, and various state officials. *Ibid.* Respondents alleged that petitioners were violating the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, in various respects, and sought declaratory and injunctive relief, but not money damages. Pet. App. 56a-57a; C.A. E.R. 2, 20-22. Petitioners California and the Department of Corrections were named as defendants only in the count alleging violations of Section 504, and not the count alleging violations of the ADA, which named only state officials acting in their official capacities as defendants. See *id.* at 16, 17.

Petitioners moved to dismiss the suit, arguing that it was barred by the Eleventh Amendment, and that the ADA and Section 504 were beyond Congress's power insofar as they abrogate the State's Eleventh Amendment immunity from suit for violations of

those provisions.[1] Petitioners also argued that the statutes do not extend to claims by prisoners against state-operated prisons. Pet. App. 60a, 64a. The district court denied the motion to dismiss, concluding that both statutes contain valid abrogations of Eleventh Amendment immunity, *id.* at 64a-68a, and that both statutes apply to state-operated prisons, *id.* at 60a-63a.

b. The district court certified the statutory question of coverage under the ADA and Section 504 for interlocutory appeal pursuant to 28 U.S.C. 1292(b), see C.A. Supp. E.R. 40-41, but the court of appeals denied petitioners' application for leave to appeal on that basis, *id.* at 46. Petitioners also took an interlocutory appeal of right of the denial of Eleventh Amendment immunity (see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993)), and the United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the abrogation of Eleventh Amendment immunity in both statutes. The court of appeals affirmed the denial of immunity. Pet. App. 50a-55a.

The court rejected petitioners' contention that Congress's authority under Section 5 of the Fourteenth Amendment is limited to remedying or prohibiting classifications that are subject to heightened judicial scrutiny, and that Congress therefore ex-

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[1] 42 U.S.C. 2000d-7(a)(1) provides that a State shall not be immune under the Eleventh Amendment from suits in federal court for violations of Section 504 (as well as several other laws prohibiting discrimination by recipients of federal financial assistance). 42 U.S.C. 12202 provides that a State shall not be immune under the Eleventh Amendment from suits in federal court for violations of nondiscrimination provisions of the ADA.

ceeded its constitutional authority when it abrogated the States' immunity in Section 504 and the ADA. Pet. App. 53a-54a. The court followed this Court's recent decision in *City of Boerne* v. *Flores*, 117 S. Ct. 2157 (1997), as well as *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), to explain that "Congress's powers under the Fourteenth Amendment are not unlimited," and that "enforcement legislation must evidence a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Pet. App. 52a-53a. "Congress acts within its authority under the Fourteenth Amendment if the court can perceive a basis upon which Congress might predicate a judgment that the state action constituted an invidious discrimination in violation of the Equal Protection Clause." *Id.* at 53a (internal quotation marks omitted).

Applying that standard, the court concluded that both the ADA and Section 504 were validly enacted under the Fourteenth Amendment. Pet. App. 53a. The court noted that this Court, in *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), held that arbitrary discrimination against persons with disabilities is prohibited by the Equal Protection Clause. Pet. App. 53a. It also credited Congress's explicit findings that "persons with disabilities have suffered discrimination." *Ibid.* (citing 42 U.S.C. 12101(a) and 29 U.S.C. 701(a)(5)). The court then held that "neither act provides remedies so sweeping that they exceed the harms that they are designed to redress." *Ibid.*

The court articulated an additional constitutional basis why the Eleventh Amendment is no bar to suits alleging violations of Section 504: Section 504 applies only to those state-operated programs or activities

that voluntarily accept federal financial assistance. Pet. App. 55a; see 29 U.S.C. 794(b). The court noted that "[o]ne way for a state to waive its immunity is to accept federal funds where the funding statute 'manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.'" Pet. App. 55a (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985)). Section 2000d-7(a)(1) of Title 42, United States Code, which permits suits against States for violations of Section 504, makes clear that States are not entitled to Eleventh Amendment immunity for such suits; therefore, "[b]ecause California accepts federal funds under the Rehabilitation Act, California has waived any immunity under the Eleventh Amendment." *Ibid.*

Finally, the court held that, because respondents seek only prospective relief, the Eleventh Amendment is no bar to the suit against those petitioners who are state officials sued in their official capacities. Pet. App. 55a (citing *Ex parte Young*, 209 U.S. 123 (1908)).[2]

2. a. *Armstrong* v. *Wilson*. Respondents John Armstrong and others are a certified class consisting of all present and future inmates with mobility, sight, hearing, learning, or kidney disabilities incarcerated in correctional facilities operated by California. Pet. App. 21a. They filed suit in federal district court

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[2] In our brief in the court of appeals, we erroneously stated that California and the California Department of Corrections were named in both counts of the complaint. See Gov't C.A. Br. 2-3, 23, in *Clark* v. *California*, No. 96-16952. In fact, California and its agency were named as defendants only in the count alleging violations of Section 504, not the count alleging violations of the ADA, which named only officials acting in their official capacities. See p. 2, *supra*.

against various California officials, but not the State itself or a state agency, alleging that petitioners were violating the ADA and Section 504, and seeking declaratory and injunctive relief (but not money damages). *Ibid.* The parties entered into a stipulation for procedures to determine liability and remedy. *Id.* at 85a. Under that stipulation, petitioners would file a motion for summary judgment arguing that they are immune from suit under the Eleventh Amendment and that the ADA and Section 504 do not apply to state prisons; if the court denied that motion, petitioners agreed that a finding of liability and a stipulated remedial order would be entered against them. *Id.* at 85a-86a. The stipulated remedial order would require petitioners to submit their proposals for future compliance with the ADA and Section 504; respondents, in turn, would submit their objections to petitioners' proposals. If respondents did not object to the proposals, then the parties would be bound to file a stipulation and proposed order; but if respondents did object, then they would be entitled to request an evidentiary hearing. *Id.* at 86a-87a.

The district court denied petitioners' motion for summary judgment, ruling that both Section 504 and the ADA contain valid abrogations of Eleventh Amendment immunity, Pet. App. 34a-42a, and that both statutes apply to state-operated prisons, *id.* at 24a-34a. The district court then entered the remedial order agreed to by the parties, requiring the submission of proposed remedial and compliance plans by petitioners. *Id.* at 77a-83a.[3]

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[3] Subsequently, there were further proceedings in the district court over petitioners' proposed remedial plans. The court held an evidentiary hearing, and, on October 8, 1997,

b. Petitioners took an interlocutory appeal of right on the Eleventh Amendment issue, and the United States intervened to defend the abrogation of Eleventh Amendment immunity. The court of appeals affirmed the denial of immunity. Pet. App. 6a-19a. The court noted that its decision in *Clark* had upheld the constitutionality of the Eleventh Amendment abrogations contained in the ADA and Section 504 (*id.* at 17a n.2), but it elected not to rest its decision on that basis. Rather, because the suit names as defendants only state officials in their official capacities and sought only prospective relief, the court relied on *Ex parte Young*, *supra*, to conclude that the district court had jurisdiction over petitioners. *Id.* at 17a-18a.

The court also ruled that the ADA and Section 504 extend to claims by prisoners against state-operated prisons. Pet. App. 11a-16a. Although the court had previously denied petitioners leave to appeal the district court's interlocutory statutory ruling under 28 U.S.C. 1292(b), it concluded that it had appellate jurisdiction over petitioners' appeal on the statutory question under 28 U.S.C. 1292(a)(1). See Pet. App. 7a-11a.[4] In particular, it concluded that the district court's order directing petitioners to submit a proposed remedial plan is an appealable order granting an

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entered an order that sustained certain of respondents' objections to the plans, directed petitioners to modify those plans in some respects, and requested further briefing on various issues arising out of the proposed plans. See Pet. App. 112a-113a.

[4] The United States participated as *amicus curiae* on the question of statutory coverage, and argued that state prisoners are covered by both the ADA and Section 504. The United States did not brief the question of appellate jurisdiction under Section 1292(a)(1).

injunction within the scope of Section 1292(a)(1). The court acknowledged that several other circuits had held that "an order requiring submission of a remedial plan is generally not an injunction that is reviewable interlocutorily under § 1292(a)(1)," *id.* at 8a, but it noted that some circuits have recognized exceptions to that rule where "the order sufficiently specifies the content of the plan to be submitted," and where "delaying the appeal would not clarify the questions on appeal and where the exact specifications of the plan would not alter in a material manner the issues that would be presented to the court of appeals," *id.* at 9a-10a (internal quotation marks omitted). The court found that petitioners' appeal satisfied both exceptions. *Id.* at 10a. On the merits of the question of statutory coverage, the court found that the plain language of both Section 504 and the ADA and the Department of Justice's implementing regulations and interpretive guidance compel the conclusion that both statutes reach the functions of state prisons. *Id.* at 11a-16a.

ARGUMENT

1. The court of appeals correctly held that the abrogations of Eleventh Amendment immunity contained in the ADA and Section 504 are valid exercises of Congress's power under the Fourteenth Amendment and the Spending Clause. It also was correct in holding that respondents could proceed against state officials in both cases under *Ex parte Young*, 209 U.S. 123 (1908). Those rulings do not conflict with any decision of this Court or any other court of appeals. Further review of the Eleventh Amendment issues raised by petitioners is therefore not warranted.

a. Petitioners argue (Pet. 8-12) that the Eleventh Amendment bars federal courts from adjudicating claims against state agencies under the ADA. The ADA provides that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of" the ADA. 42 U.S.C. 12202. Petitioners concede (Pet. 9) that the ADA contains an unequivocal expression of Congress's intent to abrogate Eleventh Amendment immunity. They contend, however, that that abrogation is invalid. That contention is without merit.

In *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114 (1996), this Court reaffirmed that Congress may remove States' Eleventh Amendment immunity pursuant to its authority under Section 5 of the Fourteenth Amendment. *Id.* at 1125, 1128, 1131 n.15; *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). And although Congress need not announce that it is legislating pursuant to its Section 5 authority for legislation to be upheld on that basis, see *EEOC* v. *Wyoming*, 460 U.S. 226, 243-244 n.18 (1983), it did make clear in the ADA that its intent was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment * * *, in order to address the major areas of discrimination faced day-to-day by people with disabilities," 42 U.S.C. 12101(b)(4).

Petitioners argue (Pet. 9-12) that the abrogation contained in the ADA is not a valid exercise of Congress's Section 5 authority. Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. In *City of Boerne* v. *Flores*, 117 S. Ct.

2157 (1997), this Court explained that the authority to enforce the Fourteenth Amendment is a broad power to remedy past and present discrimination and to prevent future discrimination. *Id.* at 2163, 2172. It reaffirmed that Congress may prohibit activities that are not themselves necessarily unconstitutional, in furtherance of a remedial scheme. *Id.* at 2163, 2167, 2169. The Court stressed, however, that Congress's power must be linked to constitutional injuries, and that there must be a "congruence and proportionality" between the identified harms and the statutory remedy. *Id.* at 2164. "The appropriateness of remedial measures must be considered in light of the evil presented." *Id.* at 2169.

In determining that the treatment of persons with disabilities in this country required "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. 12101(b)(1), Congress was acting on facts similar to those emphasized by this Court in *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985). In *Cleburne*, this Court unanimously declared unconstitutional as invidious discrimination a decision by a city to deny a special use permit for the operation of a group home for people with mental retardation. A majority of the Court recognized that "through ignorance and prejudice [persons with disabilities] 'have been subjected to a history of unfair and often grotesque mistreatment.'" *Id.* at 454 (Stevens, J., concurring); see *id.* at 461 (Marshall, J., concurring in the judgment in part). The Court acknowledged that "irrational prejudice," *id.* at 450, "irrational fears," *id.* at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," *id.* at 465 (Marshall,

J.), existed against people with disabilities in society at large and sometimes inappropriately infected government decision-making.

A majority of the Court in *Cleburne* declined to deem classifications based on disability as suspect or "quasi-suspect," in part because such heightened scrutiny would unduly limit legislative solutions to problems faced by the disabled. This Court reasoned that "[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals." 473 U.S. at 442-443. It pointed to legislation such as Section 504, intended to protect persons with disabilities, and expressed concern that requiring governmental entities to justify their efforts under heightened scrutiny might "lead [governmental entities] to refrain from acting at all." *Id.* at 444. Nevertheless, the Court left no doubt that "there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms," *id.* at 446, and indeed it held the actions at issue in *Cleburne* to have been unconstitutional.

The extensive factual basis for congressional findings about the extent of discrimination against persons with disabilities distinguishes this case from *City of Boerne*. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* (the statute at issue in *City of Boerne*), was enacted by Congress in response to this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). *Smith* held that the Free Exercise Clause does not require States to provide exceptions to neutral and generally applicable laws for religiously motivated

behavior, even when those laws significantly burden religious practices. See *id.* at 887. In RFRA, Congress attempted to overcome the effect of *Smith* by imposing through legislation a requirement that laws substantially burdening a person's exercise of religion be justified as in furtherance of a compelling state interest and as the least restrictive means of furthering that interest. See 42 U.S.C. 2000bb-1.

This Court held that application to the States of RFRA was "out of proportion" to the problems identified, so that it could not be viewed as preventive or remedial. 117 S. Ct. at 2170. First, the Court found that there was no "pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*." *Id.* at 2171; see also *id.* at 2169 (surveying legislative record). The Court also noted that RFRA's requirements of a compelling state interest and narrow tailoring imposed "the most demanding test known to constitutional law" and thus possessed a high "likelihood of invalidat[ing]" many state laws. *Id.* at 2171. While stressing that Congress was entitled to "wide latitude" in determining the need for and scope of laws to enforce Fourteenth Amendment rights, *id.* at 2164, the Court concluded that Congress had simply gone too far in attempting to regulate local behavior because, in light of the lack of evidence of a risk of unconstitutional conduct, application of RFRA to the States could not properly be viewed as remedial or preventive. *Id.* at 2169-2170. Hence, that application was not a constitutional exercise of Congress's Section 5 authority.

By contrast, based on extensive fact-finding undertaken by Congress and the Executive Branch[5] (and long experience with the analogous nondiscrimination requirement contained in Section 504), Congress made express findings in the ADA as follows:

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
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> * * * * *

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[5] That fact-finding included 14 hearings at the Capitol and 63 field hearings held in the three years prior to the enactment of the ADA. See S. Rep. No. 116, 101st Cong., 1st Sess. 4-5, 8 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 24-28, 31 (1990); H.R. Rep. No. 485, *supra*, Pt. 3, at 24; H.R. Rep. No. 485, *supra*, Pt. 4, at 28-29; see also Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393 nn.1-3 (1991) (listing all the hearings). It also drew on reports submitted to Congress by the Executive Branch. See S. Rep. No. 116, *supra*, at 6 (citing U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983); National Council on the Handicapped, *Toward Independence* (1986); and National Council on the Handicapped, *On the Threshold of Independence* (1988)); H.R. Rep. No. 485, *supra*, Pt. 2, at 28 (same).

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society[.]

* * * * *

42 U.S.C. 12101(a).[6]

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[6] Although some of the language used by Congress in Section 12101(a)(7) is drawn from decisions of this Court discussing the qualities of a constitutionally suspect class for purposes of the Equal Protection Clause, we do not suggest that Congress has declared persons with disabilities to be a suspect classification

Congress thus found that the exclusion of persons with disabilities from government facilities, programs, and benefits was in part a result of past and ongoing "outright intentional exclusion" and "purposeful unequal treatment." In the ADA, Congress sought to remedy the effects of past discrimination and prevent like discrimination in the future by mandating that "qualified handicapped individual[s] must be provided with *meaningful access* to the benefit that the [entity] offers." *Alexander* v. *Choate*, 469 U.S. 287, 301 (1985) (emphasis added).[7] Hence, the ADA requires that programs not unnecessarily exclude persons with disabilities, either intentionally or unintentionally, and that government entities make "reasonable modifications to rules, policies, or practices" for a "qualified individual with a disability," 42 U.S.C. 12131(2), when the modifications are "necessary to avoid discrimination on the basis of disability," 28 C.F.R. 35.130(b)(7).

While the ADA's nondiscrimination provision and reasonable-accommodation requirement do impose some burdens on the States, the statutory scheme

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for constitutional equal-protection purposes. See *Contractors Ass'n of Eastern Pennsylvania, Inc.* v. *City of Philadelphia*, 6 F.3d 990, 1001 (3d Cir. 1993); *More* v. *Farrier*, 984 F.2d 269, 271 n.4 (8th Cir.), cert. denied, 510 U.S. 819 (1993); but cf. *Lake* v. *Arnold*, 112 F.3d 682, 688 n.10 (3d Cir. 1997) (relying on findings in determining that mentally retarded persons may state claim under civil rights conspiracy statute, 42 U.S.C. 1985(3)). Instead, we rely on these findings as a factual basis for the remedial scheme that Congress enacted.

[7] *Alexander* involved Section 504, but Congress intended that the ADA be read as imposing substantive requirements similar to those in Section 504. See S. Rep. No. 116, *supra*, at 44; H.R. Rep. No. 485, *supra*, Pt. 2, at 84; see also 42 U.S.C. 12201(a).

created by Congress acknowledges the importance of countervailing interests as well. The ADA does not require governmental entities to articulate a "compelling interest," but only requires "reasonable modifications" that do not entail a "fundamental[] alter[ation in] the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7). In general, under the Department of Justice's implementing regulations, governmental entities need not provide accommodations if they can show "undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3), 35.164. Thus, the court of appeals correctly held in *Clark* that "neither act provides remedies so sweeping that they exceed the harms that they are designed to redress." Pet. App. 53a.[8]

This Court reaffirmed in *City of Boerne* that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." 117 S. Ct. at 2172 (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)). Following that deferential approach, the only other court of appeals that has addressed the Eleventh Amendment issue has also upheld the

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[8] Petitioners contend (Pet. 11-12) that the court of appeals in *Clark* did not expressly analyze whether there was a congruence between the ADA's ends and means, such that the ADA could be upheld as an exercise of Congress's Section 5 power under *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966), and *City of Boerne*. Petitioners, however, failed to raise that issue in their appellate brief in *Clark*, and relied solely on the argument that Congress could not exercise its Section 5 authority with respect to non-suspect classifications. Compare Pet. C.A. Br. 10-15, in *Clark* v. *California*, No. 96-16952, with Pet. C.A. Br. 30-34, in *Armstrong* v. *Wilson*, No. 96-16870.

ADA as valid Section 5 legislation. See *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997); cf. *Counsel* v. *Dow*, 849 F.2d 731, 737 (2d Cir.) (collecting cases upholding the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, as a valid exercise of Section 5 power), cert. denied, 488 U.S. 955 (1988). Accordingly, in the absence of any conflict in the circuits on the issue, this Court should deny review of petitioners' challenge to the abrogation of Eleventh Amendment immunity from ADA suits.

b. Petitioners also challenge (Pet. 8-12) the constitutionality of Congress's abrogation of Eleventh Amendment immunity from suits arising under Section 504. As with the ADA, there is no doubt that Congress intended to remove States' Eleventh Amendment immunity from suit under Section 504. See 42 U.S.C. 2000d-7(a)(1); *Lane* v. *Peña*, 116 S. Ct. 2092, 2099-2100 (1996). For the reasons discussed above, Section 2000d-7 may be sustained as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to enforce the guarantees of the Equal Protection Clause. See *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472 n.2 (1987) (opinion of Powell, J.) (stating in dictum that "[t]he Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment").

In addition, the removal of Eleventh Amendment immunity for Section 504 claims may be upheld as a valid exercise of Congress's power under the Spending Clause of the Constitution, Art. I, § 8, Cl. 1, to prescribe conditions for States that voluntarily accept federal financial assistance. In *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), this Court held that Congress had not provided suffi-

ciently clear statutory language to abrogate States' Eleventh Amendment immunity for Section 504 claims, but it stated that, if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds, *id.* at 247; cf. *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987) (upholding Congress's spending power to impose conditions for receipt of federal financial assistance by States).

Section 2000d-7 was a direct response to this Court's decision in *Atascadero*, and made unambiguously clear that Congress intended the States to be amenable to suit in federal court under Section 504 if they accepted federal funds. See *Lane*, 116 S. Ct. at 2100. Thus, as the court of appeals found, Section 2000d-7 "manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." Pet. App. 55a. Because petitioners have accepted federal funds since the enactment of Section 2000d-7, they have consented to be sued in federal court for alleged violations of Section 504. Requiring States to "honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983).

c. Finally, the court of appeals correctly ruled (Pet. App. 17a-18a, 55a) that both cases may proceed against the individually named petitioners under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), notwithstanding any claim to Eleventh Amendment immunity. The *Armstrong* complaint names only individual officers as defendants, and does not name the State itself as a defendant. Therefore, no Elev-

enth Amendment immunity issue is presented at all in *Armstrong*. Similarly, in *Clark*, respondents named only individual officers as defendants to the ADA count. Respondents in *Clark* named the State as a defendant to the Section 504 count, but the presence of the State may not be essential to that cause of action, which can proceed against the named state officers. And although petitioner contends (Pet. 13) that a State's management of its convicted felons is an essential attribute of state sovereignty that should not be amenable to a federal-court suit under *Ex parte Young*, this Court has made clear that a federal court's exercise of prospective powers against state officials charged with prison management in an *Ex parte Young* suit brought to challenge prison conditions does not implicate the Eleventh Amendment. See *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978) (Eighth Amendment challenge to prison conditions).

2. Petitioners also ask (Pet. 5) the Court to decide whether the ADA and Section 504 apply to "the State's management of their convicted felons." As petitioners point out, there is a conflict among the circuits as to whether a state prisoner may raise a claim against a state corrections agency or official under the ADA and Section 504. The Third and Seventh Circuits agree with the Ninth Circuit and have held (correctly, in our view) that the ADA and Section 504 do apply to state prisons, but the Fourth Circuit has held to the contrary.[9] Compare *Yeskey* v.

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[9] Petitioners also contend that the Tenth Circuit has held that the ADA and Section 504 are inapplicable to inmates in state prisons. See Pet. 5 (citing *White* v. *Colorado*, 82 F.3d 364 (1996)). *White*, however, held only that those statutes are not applicable to employment opportunities for prisoners. That ruling was based on the Tenth Circuit's earlier decision that

Pennsylvania Dep't of Corrections, 118 F.3d 168 (3d Cir. 1997), petition for cert. pending, No. 97-634 (filed Oct. 8, 1997) and *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481 (7th Cir. 1997) with *Amos* v. *Maryland Dep't of Public Safety & Correctional Servs.*, 126 F.3d 589 (4th Cir. 1997). In *Yeskey*, the Court has requested a response to the petition, which is due on January 5, 1998; we are informed that a certiorari petition in *Amos* may be filed within a few days.

Although the question of the coverage of the ADA and Section 504 is important, this case may not be a suitable vehicle for resolution of that issue. As we have noted (p. 3, *supra*), the question of statutory coverage was not before the court of appeals at all in *Clark*, because the court of appeals declined to accept petitioners' interlocutory appeal on that issue. And although the court of appeals addressed the question of coverage in *Armstrong* (see pp. 7-8, *supra*), it is doubtful whether the court of appeals properly exercised appellate jurisdiction in that case over the issue of coverage.[10] By contrast, in both *Yeskey* and

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prisoners are not to be considered "employees" within the meaning of Section 504. *Williams* v. *Meese*, 926 F.2d 994, 997 (1991). We do not read *White* to hold that Section 504 and the ADA are completely inapplicable to state prisoners.

[10] *Armstrong* was in the court of appeals on petitioners' appeal from the entry of an order requiring them to submit a remedial plan to the district court. The prevailing rule in the courts of appeals is that an order directing the submission of a remedial plan is not appealable as an order granting an injunction. See Pet. App. 8a-9a (collecting cases). The court of appeals held in *Armstrong* that the order was appealable because it directed that Department of Corrections officials "cluster class members with certain disabilities at designated institutions and parole facilities," *id.* at 10a, and therefore "specifie[d] the

Amos, the courts of appeals reached the issue of coverage on appeal under 28 U.S.C. 1291 from a final judgment terminating the litigation in favor of the defendants. See *Amos*, 126 F.3d at 591 (affirming grant of summary judgment); *Yeskey*, 118 F.3d at 169-170 (reversing dismissal for failure to state a claim).[11] Accordingly, should the Court conclude that the issue of statutory coverage may warrant review at this

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content of the plan to be submitted," *id.* at 9a. In fact, however, the appealed remedial order does not appear to have resolved any specific substantive issues concerning requirements of the ADA or Section 504 as applied to California's prisons. Many of those issues were contested in subsequent litigation and were resolved in another remedial order entered by the district court on October 8, 1997. See *id.* at 84a-113a. The court also exercised appellate jurisdiction under the theory that delaying the appeal would not clarify the questions on appeal. See *id.* at 9a-10a. Although postponement of the question might not have clarified the legal question of the applicability of the ADA and Section 504, subsequent proceedings would also have done much to clarify the exact content of any remedial order to be entered against petitioners, and the policy against piecemeal appeals suggests that both issues could and should be appealed at the same time. See *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478, 482 (1978) (Section 1292(a)(1) does not authorize appeals of "orders that have no direct or irreparable impact on the merits of the controversy" but "only relate[] to pretrial procedures"); cf. *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 87-88 (1981) (district court order refusing to enter consent decree was immediately appealable under Section 1292(a)(1) as order denying injunction because it had "serious, perhaps irreparable, consequence[s]" that could not be reversed after appeal from final judgment).

[11] The court of appeals in *Yeskey* noted that the plaintiff in that case brought suit only under the ADA, and not also Section 504, but it treated the coverage issues under the two statutes as the same. See 118 F.3d at 169-170.

time, it may wish to hold the petition in this case for consideration with the petition in *Yeskey* and any petition that might be filed in *Amos*, and dispose of this case in light of the disposition of those petitions.

CONCLUSION

As to the Eleventh Amendment questions presented, the petition for a writ of certiorari should be denied. As to the question presented of the coverage of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973, the petition should be held pending the Court's disposition of the petition in *Commonwealth of Pennsylvania Department of Corrections* v. *Yeskey*, No. 97-634, and any petition to be filed in *Amos* v. *Maryland Department of Public Safety & Correctional Services*, and then disposed of in accordance with the disposition of those cases.

Respectfully submitted.

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